#### MASSACHUSETTS BAR EXAMINATION

### SECOND DAY

### FEBRUARY 27, 2003 MORNING PAPER

**ESSAY SECTION** 

(9 A.M. to 12 NOON)

### **QUESTIONS**

- 1. Shortly after Helen and Albert decided to live together, they drafted and signed a writing which provided as follows:
- · Helen and Albert would contribute equally from their earnings toward their joint living expenses;
- Whenever they bought a house, title would stand in Helen's name;
- Whenever they bought a boat, title would stand in Albert's name;
- If they separated after living together for 5 years or more, either of them could apply to a court for a fair amount of support, if needed.

Several months later, Benjamin, Albert's older brother, explained that he and his wife, Wendy, had been unable to conceive a child and asked Helen and Albert to sign an agreement drafted by Benjamin's lawyer. The agreement provided that whenever Benjamin paid them jointly \$10,000, they would provide an *in vitro* fertilization clinic of Benjamin's choosing with Helen's eggs, fertilized by Albert. Benjamin, Helen and Albert signed the agreement.

Helen and Albert lived together for 10 years, during which time they bought a house which was placed in Helen's name and a sailboat which was placed in Albert's name. Toward the end of the 10 year period, Benjamin paid them jointly \$10,000 and directed Helen and Albert to send the fertilized eggs to the *in vitro* clinic. Several weeks later, after the fertilized eggs had been delivered, Helen became permanently disabled in an automobile accident and was unable to work. Albert then moved out and refused to pay any money toward their joint household expenses although Helen continued to live in the house.

Helen brought suit in court seeking support, a declaration that the house bought by Helen and Albert was owned solely by her, and an injunction against Benjamin to prevent any use of her fertilized eggs which were still at the *in vitro* clinic.

What are the rights of Helen, Albert and Benjamin?

- 2. Boomer, President of Rap, Inc. ("Rap"), was looking for commercial space suitable for a professional sound recording studio. Landlord's Agent showed Boomer the second floor of Building the first floor of which was occupied by Bar. Noticing that construction work was underway at Bar, Boomer asked Agent about Bar's plans and was told that Bar was expanding its dining area and that Bar used recorded music "for atmosphere." At Boomer's request and expense, an acoustical inspection of the studio was conducted prior to Boomer's signing the lease. Boomer's acoustical engineer found the studio suitable although neither Boomer nor his engineer ever visited Building at night and never inquired about Bar's sound system. The lease signed by Boomer and Landlord made no mention of Bar and contained the following provisions:
- A. Tenant acknowledges that Tenant has not been influenced to enter into this transaction nor has Tenant relied upon any warranties or representations not set forth herein.
- B. Rent is due and payable on or before the first of the month. If the rent is not received by the first of the month, Tenant will be subject to service of a Constable's Notice to quit as of the second of the month and Tenant is liable for all charges incurred in instituting eviction proceedings including the current \$35 constable fee regardless of whether the rent is ultimately paid.
- C. Tenant shall commit no act of waste and shall surrender the premises in the same condition as the beginning of the Lease, damage by fire not due to the Tenant's misuse or neglect excepted.

Two months after Rap moved into Building, Bar completed its construction project which included a dance floor, an upgrade of its sound systems and live music most evenings and weekends. Boomer complained to Landlord that noise and loud music from Bar disrupted recording sessions and had resulted in a substantial loss of business. Additionally, as newly constructed, stairway access to Rap's studio was possible through Bar's kitchen and the door was frequently left unlocked. Recording equipment had been stolen on several occasions from Rap's studio. Landlord told Boomer that he should add additional soundproofing to his studio and try sturdier locks. While Rap's contractor was installing the extra soundproofing material, a fire broke out that did substantial damage to both the studio and Bar. Landlord's fire insurance company refused to cover any of the

damage and Landlord told Boomer that Rap would be responsible for paying. When Landlord had not received Rap's rent check by the second of the following month, he immediately instituted eviction proceedings and hired a constable to serve the papers. Rap's rent arrived on the 10<sup>th</sup> of the month but Landlord insisted that Rap owed for both constable and legal fees.

What are the rights of the parties?

Ace decided to have a July 4<sup>th</sup> party and invited a few friends to join him. He 3. cooked hamburgers on an outdoor grill fueled by a small propane tank and set a keg of beer on the deck near the swimming pool. Toward dusk, several people who lived in the neighborhood but who had not been invited to the party arrived. One of them brought a large quantity of fireworks and proceeded to light them. The fireworks display had lasted for about 20 minutes when a rocket misfired, setting the grill propane tank on fire and seriously injuring Frieda, one of the invited guests. Ace did not know who brought the fireworks. As the fire spread, Ace attempted to clear the cars in the driveway so that an ambulance could get through. Chuck, another invited guest who was, by this point, quite drunk, thought that someone was trying to steal his car and, screaming obscenities, started a fistfight that quickly turned into a brawl. The police arrived shortly thereafter and, while trying to break up the fights which had spread to the street, Officer was pushed over, breaking his leg and dislocating his shoulder. Guests began to flee in every direction and one of them, Paul, was hit by a car as he crossed the street to his car. It later developed that the streetlights directly in front of the house were not working and Electric Company had not gotten around to replacing them. Ace also learned later that the newer version of his propane grill carried labels warning about the risk of fire and had a protective metal shield which fit over the top of the tank. Ace had purchased the grill at a yard sale but had regularly sent the tank to Manufacturer to be refilled. At no time was he told about the warning labels or the protective shield.

What are the rights of Ace, Frieda, Officer and Paul?

4. When Daniel, the building inspector of Anytown, MA, retired, he applied for and received a pension administered by the Anytown Contributory Retirement Board ("Board"). Prior to retiring, Daniel sat on the Board as employees' representative and he retained that position following his retirement. Membership on the Board provided no income or benefits. By statute and Board rule, Daniel's pension benefits would be annually reduced, depending upon his other earnings during the year, if any. In order for the Board to determine any pension reduction, Daniel had to file a sworn yearly earnings report with the Board. If the Board found that a reduction was in order, Daniel had to refund any excess to the Board.

Upon retiring, Daniel and his wife, Mary, formed a Massachusetts corporation, Building Consultants Inc., ("BCI") of which Mary was the sole shareholder, officer and director. BCI's purpose was to offer Daniel's expertise to applicants dealing with Anytown's new building inspector, Harold. Daniel and Harold agreed that Harold would urge any applicant for building permits or for other municipal relief to hire BCI as a consultant. If any applicants did so, Daniel promised to pay Harold, in cash, one-third of any fees BCI received from those applicants, who had been referred by Harold. By the end of Daniel's first year of retirement, BCI had received \$100,000 in fees, of which \$34,000 was paid to Harold, who approved all applications filed by BCI clients. Mary did no work for BCI other than keeping the books and delivering Harold's portion of the fees to him in cash. BCI paid the balance of its receipts to Mary as salary.

In Daniel's first yearly sworn earnings report, he stated that he had received no income other than his pension. Had he reported BCI's income, he would have had to refund about 75% of the money he received as pension payments during that year.

Harold has now demanded a 50-50 split with Daniel, who has refused. Harold said that if Daniel would not agree he "would go to the cops." Daniel said that Harold wouldn't dare to, but he did.

With what crimes, if any, may Daniel, Harold and Mary be charged?

- 5. During the last month, the following events occurred at the three lawyer firm of which you are a partner.
- 1. Alex, a firm client, has incurred unpaid fees at the firm of \$5,000 in connection with the defense of a criminal action against him. Your partner Amy is representing him. Shortly after the firm billed Alex, he directed Amy to withdraw her appearance in the case and send the entire original file to his new lawyer. Amy has suggested that she tell Alex that she will do what he asks after he pays the outstanding bill, and requests your opinion whether she should do so. What answer would you give her?
- 2. Your partner Paul has told you and Amy that he intends to withdraw from the firm to become a partner at a larger firm in the same city. When the three of you formed the firm, you entered into a written partnership agreement that provided, in part, as follows:

"If any partner should withdraw from the firm voluntarily, he or she shall not practice law within this city for one year from and after the date of withdrawal."

Paul has asked you and Amy to waive that provision. What answer will you give Paul?

3. Following a review of the firm's books, its outside accountant informed you and Amy that Paul had used funds kept in the firm's Clients' Trust Fund account ("account") for personal purposes, with the result that the account was substantially depleted. On the same day, the firm received a demand from a client that the firm now deliver to him the net proceeds from a completed real estate transaction which had been held in the account. There are not sufficient funds in the account to meet the client's demand. Amy asks what you and she should do. What will you advise?

#### MASSACHUSETTS BAR EXAMINATION

## SECOND DAY

# FEBRUARY 27, 2003 AFTERNOON PAPER

**ESSAY SECTION** 

(2 P.M. to 5 P.M.)

#### **QUESTIONS**

- 6. Salesman, a Massachusetts resident, was hired by Brush Co., a corporation with headquarters in a far western state, to sell its hair brushes to retail stores in the New England states. Brush Co.'s printed form employment contract was executed by the parties. The contract provided:
  - During the three years following Salesman's leaving the company he will not work for a competitor selling hair brushes in any state east of the Mississippi River.
  - Salesman would be advanced \$3,000 each month during the first six months of employment and if he terminated the employment at the end of that time, he would be liable to Brush Co. for three times the amount of the advances paid to him or three times the amount of commissions he had earned, whichever was greater.
  - Any dispute between the parties was to be decided only in a suit brought in the far western state.
  - If any portion of the contract was not enforceable, that would not prevent enforcement of the other provisions.

Under the case law of the far western state, all the provisions of the contract were enforceable as written.

Although he earned commissions in excess of the advances paid to him, Salesman quit his job at the end of six months. He then brought suit in the Superior Court in Massachusetts seeking a declaratory judgment that the contract was not enforceable against him. Brush Co. moved to have the suit dismissed and, pursuant to a

counterclaim, sought an injunction to enforce the non-competition clause and a judgment for three times the amount of commissions paid to Salesman.

How should the court rule?

7. Prince was the President and Chief Executive Officer of a manufacturing corporation. The Board of Directors consisted of Prince; Duke, who was Vice-President in charge of manufacturing; Elder, the founder and retired Chief Executive Officer; Bullitt, the President of state bankers association; and Munster, the minister of the largest local church. Prince's employment contract provided for a salary, plus a bonus of .001 percent of annual "sales" in excess of \$1 billion. Prince excluded refunds for returned goods from his bonus calculations and received a bonus of \$2 million for calendar year 2001. The corporation's independent accountants subsequently reported to the Board of Directors in an annual report that the omission of the refunds was improper for calculation of Prince's bonus. The Board of Directors had received a letter to the same effect from in-house counsel of the corporation during 2001, but had never discussed the matter. If refunds had been included in the calculation, Prince's bonus would have been \$500.000.

Embarrassed by the annual report of the accounting firm, which the Board traditionally sent out to shareholders, the Board fired Prince and Elder again became the Chief Executive Officer

Plaintiff, a stockholder, wrote to the Board demanding that the corporation sue

Prince to recover the amount of the bonus overpayment. The Board referred the letter to

Bullitt and Munster, as a committee authorized to respond appropriately. They met with
the in-house counsel and, contrary to his advice, they decided that the bad publicity for
the corporation which would result from such a suit outweighed the benefit of recovering
the amount of the overpayment. They wrote a brief letter to plaintiff, stating their
conclusion.

Plaintiff wants to sue the corporation. What advice should his lawyer give him?

- 8. Alan, a long-distance truck driver, was injured when the truck he was driving veered out of control and hit a telephone pole. He commenced a civil action in the Massachusetts Superior Court Department in Suffolk County against MotorWorks Company ("MotorWorks"), the car's manufacturer, alleging that the steering mechanism was defective.
- A. Two days after the accident, Alan hired Engineer, a mechanical engineer, who examined the wrecked truck for purposes of later testifying at trial. Alan then disposed of the truck. What information may MotorWorks obtain through discovery regarding Engineer as a matter of right? May MotorWorks seek further information, and if so, how and with what anticipated success?
- B. Based upon its investigation, MotorWorks believed that the accident may have occurred when Alan fell asleep while driving. MotorWorks took the deposition of Alan's girlfriend, Beth, in Berkshire County, where she resided, and asked her whether Alan had ever disclosed to her in private how the accident had happened. Beth refused to answer. What procedural action may MotorWorks take, and how should the Court rule?
- C. Alan made requests to MotorWorks for production of the following listed documents. MotorWorks does not want to comply with any of Alan's requests. What procedural action may MotorWorks take and, as to the documents listed in each of the numbered paragraphs below, how should the Court rule?
- (1) Written statements obtained by MotorWorks' attorney from two eyewitnesses to the accident, one of whom subsequently moved out of the country.
- (2) A copy of Alan's own tape-recorded telephone interview given to MotorWorks' insurance adjuster the day after the accident.

- (3) All of MotorWorks' financial records for the period of five years prior to the accident.
- (4) MotorWorks' insurance agreement with its liability carrier and the application for such insurance, which Alan believes may contain information about prior claims against Motorworks.
- (5) All written memoranda to the President of MotorWorks from in-house counsel relating to a proposed recall campaign for the trucks it had manufactured with the same steering mechanism as in Alan's truck.
- D. At trial, two years after the close of discovery, MotorWorks called Witness, an eyewitness to the accident whom MotorWorks' investigators had located several days after MotorWorks had responded to Alan's interrogatories seeking the names of all persons having knowledge of discoverable matters. Alan, who had no prior knowledge of Witness, objected.

How should the Court rule?

9. You are a Massachusetts attorney. Paul and Victoria, both New York residents, have consulted you for advice. Six months ago, Paul, accompanied by Victoria, was driving through Massachusetts when he was stopped by two police officers, Davis and Andrews, who mistakenly believed Paul to be a fugitive wanted for armed robbery and murder. Following a scuffle in which Victoria was injured, Paul was arrested and brought to the police station, where he was held for over thirty-six hours and interrogated by Davis and Andrews. During his interrogation, Davis and Andrews kept Paul in isolation, denied him any food, hit him and refused to let him consult with an attorney. After Paul's identity was confirmed, he was released, but he was hospitalized for several weeks and is still recovering from the physical and emotional trauma of the incident. Victoria also received treatment for her injuries and has fully recovered. Paul's medical expenses exceeded \$100,000, while Victoria's were approximately \$5,000. Following the incident, Davis and Andrews were both suspended. Davis still resides in Massachusetts, but Andrews has moved to New York.

You have determined that Paul may have claims against Davis and Andrews under Massachusetts law for false imprisonment, assault and battery, and intentional infliction of emotional distress, as well as a claim for violation of his civil rights under 42 U. S. C. s. 1983, a federal statute, which may be brought in either state or federal court. You also believe that Victoria may have a claim against both Davis and Andrews for assault and battery.

Paul and Victoria have indicated to you that they prefer to proceed against Davis and Andrews in a federal court in either Massachusetts or New York rather than a state court. What advice will you give to them?

10. Herbert and Willa were married. They had no children together, although Herbert had one adult child, Charles, who had been born out of wedlock and with whom Herbert had no contact. Herbert left Willa and began a relationship with Ann. Willa then filed for divorce in the Probate and Family Court. A hearing was held and the Court entered a judgment of divorce *nisi*. The judgment also contained provisions dividing the marital property of Herbert and Willa.

A week after entry of the judgment *nisi*, Herbert executed a will leaving his entire estate to Ann. Herbert's will provided that Willa was to receive nothing but made no mention of Charles. Herbert also executed an *inter vivos* trust into which he transferred bank accounts in the total amount of \$100,000, which he had received under the divorce judgment. By the terms of the trust, Herbert retained total control over the trust during his lifetime, and upon his death all of the trust assets were to be distributed to Ann.

A month after entry of the judgment *nisi*, Herbert was seriously injured in a car accident caused by the negligence of Daniel. Herbert remained conscious after the accident but in great pain. He died several days later. Herbert's will has been allowed by the Probate and Family Court. At the time of his death, other than the trust assets, Herbert owned an apartment building from which he received rental income and had an investment account worth \$50,000. In addition, Daniel's liability insurer has offered to settle with Herbert's executor for the maximum policy limit of \$1,000,000, to be allocated as follows: \$250,000 for conscious suffering and \$750,000 for wrongful death.

What are the rights of the parties?

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